RECEIVED
FEB 11 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5876

---

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

---

ANTHONY CHARLES WILLIAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

---

Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of Texas

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

MARK WHITE
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

JOHN W. FAINTER, JR.
First Assistant Attorney General

LESLIE A. BENITEZ
Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

## QUESTIONS PRESENTED

I. WERE VENIREMEN EXCLUDED FROM PETITIONER'S TRIAL IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS?

II. DID THE DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE TO VENIREMAN WAGNER VIOLATE PETITIONER'S RIGHT TO AN IMPARTIAL TRIAL WHERE THE VENIREMAN TESTIFIED THAT SHE COULD CONSIDER THE FULL RANGE OF PUNISHMENT?

III. SHOULD THIS COURT CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 3 |
| REASONS FOR DENYING THE WRIT | 3 |
| I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION | 3 |
| II. NO VENIREMEN WERE EXCLUDED FROM PETITIONER'S TRIAL IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS | 4 |
| III. THE DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE TO VENIREMAN WAGNER DID NOT VIOLATE HIS RIGHT TO AN IMPARTIAL TRIAL AS THE VENIREMAN TESTIFIED THAT SHE COULD CONSIDER THE FULL RANGE OF PUNISHMENT | 6 |
| IV. THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW | 7 |
| CONCLUSION | 9 |

## INDEX OF AUTHORITIES


| Cases | Page |
|---|---|
| Davis v. United States, 411 U.S. 233 (1973) | 8 |
| Estelle v. Williams, 425 U.S. 501 (1976) | 8 |
| Jurek v. Texas, 428 U.S. 262 (1976) | 8 |
| Lockett v. Ohi, 438 U.S. 586 (1978) | 8 |
| Michigan v. Tyler, 436 U.S. 499 (1978) | 6,7 |
| Wainwright v. Sykes, 433 U.S. 72 (1977) | 8 |
| Williams v. State, 622 S.W.2d 116 (Tex.Crim.App. 1981) | 1,6,7 |
| Witherspoon v. Illinois, 391 U.S. 510 (1968) | 3,4,6 |

| Statutes | |
|---|---|
| U.S. Const. amend. V | 2 |
| U.S. Const. amend. VI | 2 |
| U.S. Const. amend. IVX | 2 |
| 28 U.S.C. §1257(3) | 1 |
| Article 36.15, V.A.C.C.P. | 7 |
| Article 36.14, V.A.C.C.P. | 7 |
| Article 37.071, V.A.C.C.P. | 2,4,7,8 |
| V.T.C.A. Penal Code §12.31(b) | 6 |
| V.T.C.A. Penal Code, §19.03 | 2 |
| Rule 17, Rules of the Supreme Court | 3 |

NO. 81-5876

---

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

---

ANTHONY CHARLES WILLIAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

---

Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of Texas

---

RESPONDENT'S BRIEF IN OPPOSITION

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered October 14, 1981, is reported at 622 S.W.2d 116 (Tex.Crim.App. 1981), Williams v. State, and is attached to the petition at Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Also involved is Article 37.071, Vernon's Ann. C. C. P.

## STATEMENT OF THE CASE

Petitioner was tried in September, 1978 for the kidnap-murder of thirteen-year-old Vickie Lynn Wright. See, V.T.C.A. Penal Code, Sec. 19.03. On June 12, 1978, Vickie went to a Houston bowling alley with her sister (SF 1670-1673). 1/ Later that evening, Vickie went outside to a friend's car to get some money, and never returned (SF 1678-1683). The car was missing also. Petitioner was observed later that evening recklessly driving the missing vehicle (SF 1719-1726, 1733-1737). Blood was observed on Petitioner's clothing and in the car (SF 1714-1716, 1727-1729). Due to information subsequently obtained, police arrested Petitioner the next day (SF 1750-1753). Vickie's partially nude body was found in some bushes; she had been beaten to death (SF 1740-1746). Petitioner after being fully advised of his rights, executed a lengthy confession to the offense, admitting that he had abducted and murdered the girl (SF 1861-1863, 2155). An examination of the body revealed that Vickie had been beaten to death on the head and chest, and seminal fluid was found in her mouth and rectum (SF 1891-1894). Additional evidence was offered which showed Petitioner to have been the murderer.

At the punishment phase of the trial, the evidence showed that around the time of Vickie's murder, Petitioner had abducted and brutally sexually assaulted four other women of varying ages (SF 1960-1969, 1970-1982, 1992-2007, 2010-2030). One of these women he shot in the face and left for dead (SF 1996-2007).

Petitioner presented evidence from relatives and acquaintances that he was "a little bit slow" and that they would

---

1/ "SF" will refer to the state court records which contain a transcription of the testimony from Petitioner's trial.

attempt to help Petitioner become rehabilitated (SF 2032-2055). Additionally, Petitioner presented the testimony of a psychiatrist that he (Petitioner) may not have intended to murder his victim and that he was of low intelligence (SF 2055-2067). In rebuttal, the state presented the testimony of a psychologist that Petitioner was not mentally defective (SF 2092-2099).

## SUMMARY OF THE ARGUMENT

There are no special and important reasons for review of this case. The record does not support Petitioner's claims that four veniremen were excluded in violation of the doctrine of Witherspoon v. Illinois. Because after extensive examination, each voiced unequivocal and unambiguous resolve to automatically vote against the imposition of the death penalty no matter what the evidence revealed, each was properly excluded.

Petitioner's contention that venireman Weaver could not be a fair and impartial juror is not supported by the record. The record shows that Weaver could consider the entire range of punishment, including the minimum, and that she would follow the law in determining both guilt and punishment.

This Court should decline to consider a claim to which Petitioner made a procedural default by failing to raise the claim in accordance with state procedural law. Petitioner's objections to the jury charge were not presented to the trial court, as state law requires. Further, this Court previously has reviewed Petitioner's contention concerning the constitutionality of the Texas death penalty statute, and found it to be without merit.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

NO VENIREMEN WERE EXCLUDED FROM PETITIONER'S TRIAL IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS.

Petitioner's contention that four prospective jurors were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) is meritless, as the state court records will reveal. Further, as to one of the prospective jurors, Ogeal Criner, Petitioner failed to make a contemporaneous objection as required by state procedural law.

Venireman James Tillman did not believe in capital punishment and had scruples which would prevent him from returning a death verdict (SF 371). He could not look at the facts presented in a case and answer the statutory special issues [2/] "yes" knowing that that would result in the imposition of the death penalty. As a minister, he had preached against the death penalty many times (SF 380). He would be unable to participate in giving the death penalty (SF 382), regardless what the evidence might reveal and in spite of how horrible the case (SF 382-383). Even if the evidence proved to him that the special issues should be answered "yes," his religious beliefs would prevent him from so answering (SF 386). Instead, he would answer the special issues "no" to insure that the defendant would not receive the death penalty (SF 386-387). There was no set of circumstances or set of facts which would change his mind (SF 388-389). Upon examination by the defense, Tillman iterated that he could not answer the issues in the affirmative, even if the evidence mandated it (SF 388-389). Although Tillman equivocated several times during the thorough and detailed voir dire examination (SF 373-74, 390, 391, 393), his final answers made unequivocal that, by his answers to the special issues, he could not ever, under any facts or circumstances, follow the law or vote for the imposition of the death penalty (SF 391, 394). Finally, he testified that, no matter what the evidence revealed, he would automatically vote

---

2/ Article 37.07.(b)(1)(2), Vernon's Ann. C. C. P.

"no" to one of the special issues to prevent the imposition of the death penalty (SF 394).

Venireman Ogeal Criner first believed that she could answer the special issues in the affirmative, if the evidence so justified, knowing that a death sentence would result (SF 725). Her views, however, changed as the matter was explained further. She did not believe that anyone had the power to take a life (SF 726), and her conscience would prohibit her from answering the issues "yes", even if the evidence supported that answer, knowing that the death penalty would result (SF 728). She maintained that no matter what the evidence showed, she would always vote "no" to avoid the death penalty (SF 728). The serious penalty would affect her deliberations to the extent that she would vote so as to avoid death (SF 729). Finally, Criner maintained that "no matter how horrible the the circumstance" of the crime, she could not answer the issues "yes" even if the evidence "overwhelmingly" indicated an affirmative answer (SF 730).

Venireman Rosa Anderson (SF 1166-1167) testified that under no circumstances, no matter what facts, she could never participate in returning a death verdict (SF 1166, 1167). She reiterated that this was true no matter what circumstances (SF 1168). Although she then stated that she might be able to answer the questions in the affirmative if the evidence so justified (SF 1171, 1172, 1173), when it was explained what the effect of affirmative answers would be, she retracted her earlier statements (SF 1175). Thereafter, she steadfastly maintained that she would automatically vote against the imposition of the death penalty, no matter what the circumstances or facts (SF 1175, 1176).

Venireman Mary Oligney first equivocated several times regarding whether she ever could answer the special issues affirmatively, knowing that the death penalty would be imposed (SF 1273-1285). Upon continued questioning and efforts by the court and the parties to ascertain unequivocal answers, she testified that she would answer one of the special issues in such a way as

to insure that the defendant received a life sentence rather than death (SF 1288), and that she could not vote for the imposition of death regardless of the facts (SF 1288). She iterated that she would answer the questions not on the evidence but to avoid the death penalty (SF 1289). She could not imagine any set of facts which would change her mind or circumstances where she could answer both special issues "yes" (SF 1292), and in every case, regardless of the facts or how horrible the case, she would vote against the imposition of death (SF 1292).

Because each of the four veniremen finally voiced unequivocal and unambiguous resolve to vote against the imposition of the death penalty no matter what the case or evidence at trial, their exclusion for cause did not violate the doctrine of Witherspoon v. Illinois, 391 U.S. at 522, n.21. 3/

III.

THE DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE TO VENIREMAN WAGNER DID NOT VIOLATE HIS RIGHT TO AN IMPARTIAL TRIAL AS THE VENIREMAN TESTIFIED THAT SHE COULD CONSIDER THE FULL RANGE OF PUNISHMENT.

Petitioner complains of the trial court's denial of his challenge for cause to veniremen Wagner, alleging that Wagner stated that she would impose the death penalty in all capital convictions and could not consider probation for a murder offense. The record of the voir dire examination of Wagner does not support these claims. 4/

---

3/ Contrary to Petitioner's assertions, these veniremen were not excused pursuant to V.T.C.A. Penal Code Section 12.31(b) held unconstitutionally broad in Adams v. Texas, 448 U.S. 38 (1980).

4/ Further, this Court should refuse to consider Petitioner's contention regarding Wagner's alleged refusal to consider probation. As found by the Court of Criminal Appeals, Petitioner failed to raise this objection in the trial court; thus, the appellate court refused to review the merits of this contention. Williams v. State, 622 S.W.2d at 119. This procedural default constitutes an adequate and independent ground of decision barring review. Michigan v. Tyler, 436 U.S. 499 n.7 (1978).

Venireman Wagner was thoroughly examined both by the trial court and the parties, and her recitations, as reflected by the record, establish that she was not subject to a challenge for cause and that she could be a fair and impartial juror. Wagner testified that if the evidence were not sufficient to support the special issues, she would vote "no" (SF 1581-1582); she would not vote to convict unless the elements of the offense were proven beyond a reasonable doubt (SF 1594-1596). Although Wagner stated that she favored capital punishment (SF 1570), her entire voir dire examination reveals that she could be fair and impartial both on the issues of guilt and punishment, and would follow the law. As such, she was not subject to a challenge for cause and the trial court's refusal to sustain Petitioner's challenge did not deprive him of any constitutional guarantee.

IV.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW.

Petitioner contends that the Texas capital sentencing statute, Article 37.071, Vernon's Ann. C. C. P. is unconstitutional because it fails to direct the jury to consider mitigating circumstances at the punishment phase of the trial. Petitioner raised this contention in his direct appeal and the state appellate court found:

> The appellant has failed to preserve the error now asserted on appeal. No objection to the court's charge or special requested instruction was filed. Article 36.14 & 36.15, V.A.C.C.P. Absent such an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error.

Williams v. State, 622 S.W.2d at 120.

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499

n.7 (1978). That the state has a legitimate interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner desired an additional instruction, he should have requested such at the time the instructions were submitted to the jury. Having failed to make this request in the trial court, Petitioner should not be heard to now complain.

Further, this Court previously has rejected this contention on the merits. In Jurek v. Texas, 428 U.S. 262 (1976), the Texas death penalty statutes were upheld as constitutional. This Court held that:

> Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that ... the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. (emphasis added).

428 U.S. at 273. The Court continued in stating that:

> [b]y authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

428 U.S. at 276.

In Lockett v. Ohio, 438 U.S. 586 (1978) the Court recognized the "facial narrowness" of Texas' Article 37.071, supra, but concluded that the Court of Criminal Appeals "had broadly interpreted the second question ... so as to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show." 438 U.S. at 607.

This Court should refuse to review this ground.

## CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT